Johnny Lim Chin Teik v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44–45 OF 1997
KC VOHRAH J
28 FEBRUARY 1998

Criminal Procedure *— Appeal — Petition of appeal — Filing of — Application to file out of time — Whether good reason for delay — Criminal Procedure Code (FMS Cap 6) s 310*

The applicant applied under s 310 of the Criminal Procedure Code (FMS Cap 6) for leave to file his petition of appeal out of time. In the affidavit in support of the application, the applicant deposed that he had no time to go through the grounds of judgment because he had to spend time to make arrangements for his maid to return home overseas. In the supplementary affidavit, it was stated that the applicant had been convicted of three charges. It was also averred that the applicant was having difficulty in filing a proper petition of appeal because copies of exhibit and other documents produced at the trial were not attached to the notes of proceedings.

Held, dismissing the application:

(1) No good reason was advanced by the applicant for the delay in filing the petition of appeal except the vague reason of some things taken place during the 10 days within which he had to file his petition and that he had to make arrangements for his maid to go home (see p 619E).

(2) The affidavit while disclosing the three charges under which the applicant had been convicted did not show anywhere why the convictions were wrongly made and that there were merits in the appeal and that there was an arguable appeal (see p 619G–H).

(3) The exhibit and other documents produced at the trial could have easily been inspected in the registry of the lower court concerned. What was disclosed, however, in that affidavit was that the deponent wrote to the senior registrar of the sessions court for such documents after the period during which he should have filed the petition of appeal had in fact expired (see p 620A–B).

(4) In order that substantial justice may be done in this case, all relevant material should have been disclosed to the court but unfortunately the court was not appraised of them and the application for the extension of time was dismissed (see p 620C).

[Bahasa Malaysia summary

Pemohon telah memohon di bawah s 310 Kanun Prosedur Jenayah (FMS Cap 6) untuk kebenaran untuk memfailkan petisyen rayuan di luar masa. Dalam afidavit untuk menyokong permohonannya, pemohon memberikan keterangan bersumpah bahawa beliau tidak

A mempunyai masa untuk membaca semua alasan penghakiman oleh kerana dia mengambil masa membuat persediaan menghantar pulang pembantu rumahnya ke seberang laut. Dalam afidavit tambahan, adalah dinyatakan bahawa perayu telah disabitkan untuk tiga tuduhan. Adalah juga ditegaskan bahawa pemohon menghadapi kesusahan dalam memfailkan petisyen rayuan yang betul oleh kerana salinan B ekshibit dan dokumen-dokumen lain yang dikemukakan semasa perbicaraan tidak dimasukkan bersama dengan nota prosiding.

Diputuskan, menolak permohonan:

(1) Tiada alasan dapat diutarakan oleh pemohon untuk kelewatan C memfailkan petisyen rayuan kecuali alasan yang samar-samar bahawa sesuatu telah terjadi dalam masa 10 hari di mana beliau perlu memfailkan petisyen dan bahawa beliau perlu membuat persediaan untuk pembantu rumahnya pulang (lihat ms 619E).

(2) Afidavit tersebut sementara menyatakan tiga tuduhan di mana D pemohon telah disabitkan, tidak menunjukkan di mana-mana mengapa sabitan telah dibuat dengan salah dan bahawa terdapat merit dalam rayuan dan bahawa terdapat rayuan yang boleh dihujahkan (lihat ms 619G–H).

(3) Ekshibit dan dokumen-dokumen lain yang dikemukakan semasa perbicaraan boleh diperiksa dengan mudah di bahagian E pendaftaran di mahkamah rendah yang berkenaan. Sebaliknya, apa yang dinyatakan dalam afidavit adalah bahawa pembuat afidavit telah menulis kepada penolong kanan pendaftar di mahkamah sesyen untuk dokumen-dokumen tersebut selepas tempoh di mana dia perlu memfailkan petisyen rayuannya telah luput (lihat ms 620A–B).

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(4) Untuk memastikan bahawa keadilan dilaksanakan di dalam kes ini, semua bahan yang berkaitan sepatutnya dikemukakan kepada mahkamah tetapi malangnya mahkamah tidak dapat menilainya dan maka permohonan untuk lanjutan masa diketepikan (lihat ms 620C).]

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Notes

For cases on appeal generally, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 109–446.

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Cases referred to

Jumari bin Mohamed v PP [1982] 1 MLJ 282 (refd)
Masnelan Pakpahan v PP [1989] 2 CLJ 452 (refd)
Veerasingham v PP [1958] MLJ 76 (refd)

I

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 307(iv)(ix), 310

Dzulkifli bin Ahmad (Deputy Public Prosecutor) for the Public Prosecutor. A
Balaguru (*K Balaguru & Co*) for the applicant.

KC Vohrah J: The applicant applied under s 310 of the Criminal Procedure Code (FMS Cap 6) for leave to file his petition of appeal out of time. I dismissed the application.

Section 310 states: B

> A Judge may on the application of any person desirous of appealing who may be debarred from so doing upon the ground of his not having observed some formality or some requirement of this Code, permit an appeal upon such terms and with such directions to the Magistrate and to the parties as such Judge shall consider desirable in order that substantial justice may be done in C the matter.

As was pointed out by Mohamed Azmi J (as his Lordship then was) in *Jumari bin Mohamed v PP* [1982] 1 MLJ 282 at p 284 an extension of time to file a petition of appeal or to amend such a petition out of time should not be granted as a matter of course. D

The Court of Appeal case in *Veerasingham v PP* [1958] MLJ 76 considered the powers, principles and procedure governing the grant of an extension of time to lodge a petition of appeal and the permitting of amendments to the petition. Mohamed Azmi J in *Jumari* at p 283 was of the view that the decision in *Veerasingham* applies not only to an application for extension of time for filing a petition of appeal but also to an application for E extension of time for filing a petition of appeal under s 307(iv) of the CPC. His Lordship was of the view that having regard to the provision of sub-s (iv) read with sub-s (ix) of s 307, there appears to be no reason why a distinction in principle should be made between them when considering an application for extension of time under s 310. F

In *Veerasingham* at p 79, Thomson CJ (as he then was), delivering the judgment of the Court of Appeal, elaborated on the matters that a judge under s 310 has to consider so as to exercise his discretion properly 'in order that substantial justice may be done':

> Clearly, to exercise his discretion properly the judge must apply his mind to all G the relevant material. He must consider the circumstances of the original trial. He must consider the original petition of appeal. And he must consider the circumstances which are now urged upon him to induce him to allow any departure from or addition to the original petition of appeal. He must consider his own powers as to such matters as the granting of adjournment and the requiring of notice to be given. And then he must exercise his discretion as he sees H fit in order that substantial justice may be done in the matter. It may be that he may find it helpful to look at what has been done in some other cases by some other judges but if he does, he must be careful to look at what that other judge has done merely as an illustration and not as laying down any judicial precedent ... .

Bearing in mind what was stated, the first matter I had to address when hearing the application was, as pointed by Mohamed Azmi J in *Jumari* at I p 283, the nature of the circumstances of the case so to enable the court to exercise its discretion in order that substantial justice may be done.

A At the first hearing of the matter on 9 December 1997 except for the ground advanced by the lawyer who affirmed the affidavit supporting the application, no other ground was given for the application. The ground relied on was that his maid was suddenly forced to return home overseas and he had to spend time to make arrangements for her return. He averred that because of that he could not go to his office for a week and he had no B time to go through the grounds of judgment of decision given in the case.

The affidavit did not indicate the nature of the offences the applicant had been charged with, what the outcome of the trial on the charge or charges was and whether the appeal was against conviction or sentence. The court pointed out the absence of facts relating to the charge or charges to C the counsel of the applicant and then granted an adjournment requested by her for a supplementary affidavit to be filed.

On the resumed hearing on 15 January 1998 En Balaguru appeared for the applicant. A supplementary affidavit had been filed for consideration. In that affidavit the deponent stated that he had been retained by the applicant to represent him in three criminal cases. He received the 'nota keterangan' D ('notes of evidence') though he meant the 'notes of proceedings' on 17 October 1997. He stated that he could not do anything between that date and the date of expiry of the appeal period, 27 October 1997, because of several things happening between the said dates. It will be noted that he did not condescend to explaining what were the several things which had E taken place between the dates.

Thus no good reason was advanced for the delay in filing the petition of appeal except the vague reason of some things taking place during the 10 days within which he had to file the petition and that he had to make arrangements for his servant who was from overseas to go home. Did the arrangements require a whole 10 days? F

It was also stated in the affidavit that when the deponent was informed by his pupil that the date by which the petition had to be filed had expired he wrote a letter (referring to the letter dated 28 October 1997 exhibited in the first affidavit) to the registrar of the sessions court for extension of time of a week to file the affidavit of service whereas under the Criminal G Procedure Code an application for extension of time has to be made to the High Court.

Turning to another matter notwithstanding that the applicant was given the opportunity to file a supplementary affidavit, the affidavit while disclosing the three charges under which the applicant has been convicted, H does not show anywhere why the convictions were wrongly made and that there are merits in the appeal, that there is an arguable appeal. As was pointed out succinctly by Mohd Dzaiddin J (as he then was) in *Masnelan Pakpahan v PP* [1989] 2 CLJ 452 at p 453 when his Lordship commented on the exercise of discretion under s 310:

I > In the final analysis, the exercise of the discretion depends on the facts and circumstances of each case. In the present application, it is deposed that there are strong grounds of appeal on the merits and in law and that the failure of the solicitors to file the petition of appeal in time was due to inadvertence. In

> my judgment, it is insufficient for the deponent to state that he believes there are strong grounds in the appeal on the merits and in law without at least mentioning what the grounds are and the law involved. He ought to have exhibited to his affidavit a proposed petition of appeal ... .

Finally, while the affidavit did allude to the deponent having difficulty in filing a proper petition of appeal because copies of exhibits and other documents produced at the trial were not attached to the notes of proceedings, these could have easily have been inspected in the registry of the lower court concerned. What is disclosed, however, in that affidavit is that the deponent wrote to the senior registrar of the sessions court for such documents after the period during which he should have filed the petition of appeal had in fact expired.

In order that substantial justice may be done in this case all relevant material should have been disclosed to the court but unfortunately the court was not appraised of them and the application for the extension of time was dismissed.

Application dismissed.

Reported by Jafisah Jaafar